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Conflict of Laws, Product Liability and the Substantive Law of New Zealand in *Bennett v. Enstrom Helicopter Corp.*

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I. INTRODUCTION

The New Zealand tort system is unique and innovative in its means of compensating accident victims or their dependents in the case of death.¹ This system of compensation is embodied in the New Zealand Accident Compensation Act (1972)² (ACA), which came into

* Special thanks must be extended to Professor Martin A. Bradley of the Institute of Air and Space Law, McGill University, Montreal, for reading the draft of this article. I am, however, solely responsible for any remaining error.

1. This system is unique in that compensation is not fault-dependent. While nonfault compensation provisions are used in automobile liability and workers' compensation statutes in the United States and throughout the Commonwealth, the New Zealand statute extends this to all cases of death or personal injury due to accident.

2. No. 43, 1 N.Z. Stat. 521 (1972) *as amended by* the Accident Compensation Amendment Act (No. 2), No. 113, 1 N.Z. Stat. 829 (1973) [hereinafter cited as ACA]:

An Act to make provision for safety and the prevention of accidents; for the rehabilitation and compensation of persons who suffer personal injury by accident in respect of which they have cover under this Act; for the compensation of certain dependents of those persons where death results from the injury and for the abolition as far as practicable of actions for damages arising directly or indirectly out of personal injury by accident and death resulting therefrom and certain other actions.

The impetus for this reform in the law of personal injury liability came primarily from two National (Conservative) Government Ministers, the Honorable Messrs. T.P. Shand and R. Hanan. In 1963 they established a committee to examine the question of application of this principle to liability for motor vehicle accidents. This attempt being a failure, Mr. Shand saw this as an area of the law for which a Royal Commission of Inquiry would be an appropriate investigatory body. In 1966 a Royal Commission of Inquiry was set up under the chairmanship of Mr. Justice Woodhouse (now Sir Owen). This Commission's Report, *Compensation for Personal Injury in New Zealand—Report of the Royal Commission of Inquiry*, also referred to as *The Woodhouse Report*, resulted in the enactment of the Accident Compensation Act in its present form. Notable among the recommendations of *The Woodhouse Report* was that all injured persons should receive a uniform method of assessment, irrespective of the cause of the injury. For a full account of the legislative history of the ACA see Mathieson, *Royal Commission of Inquiry: Compensation for Personal Injury in New Zea-*

force on April 1, 1974. The Act provides a uniform system of rehabilitation and compensation for personal injury or death resulting from accident in New Zealand. It replaced the two earlier sources of compensation found in the Workers' Compensation Act (1956)³ and the common law, in which recovery of full compensation depended upon proof of negligence, with a statutory nonfault system based on eighty percent compensation limited to a maximum amount.⁴ While the new system of compensation guarantees recovery, the *quid pro quo* is a ceiling on the recoverable amount and a limitation on the compensation allowed for lost earnings.⁵

One of the most noted features of the ACA is that it abolishes the common-law right to bring proceedings for compensatory damages⁶ based on either tort or contract.⁷ This right, however, is not abolished when the ACA does not apply or when proceedings are brought outside New Zealand.⁸ While certain provisions of the ACA have been the

land, 31 MOD. L. REV. 544 (1968); Palmer, *Compensation for Personal Injury: A Requiem for the Common Law in New Zealand*, 21 AM. J. COMP. L. 1 (1973); Palmer, *Abolishing the Personal Injury Tort System: The New Zealand Experience*, 9 ALBERTA L. REV. 169 (1971); Palmer & Lemons, *Toward the Disappearance of Tort Law—New Zealand's New Compensation Plan*, U. ILL. L.F. 693 (1972); Note, *Compensation for Personal Injury in New Zealand*, 18 INT'L & COMP. L.Q. 191 (1969). For analysis of the provisions of the ACA see Harris, *Accident Compensation in New Zealand: A Comprehensive Insurance System*, 37 MOD. L. REV. 361 (1974); Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 AM. J. COMP. L. 1 (1977). See also Miller, *Compensation for Personal Injury: Social Insurance and Comparative Perspective*, 4 COMP. L. Y.B. 221 (1980).

3. No. 62, 16 N.Z. REPR. STAT. 799 (1956). In a workers' compensation claim, recovery was dependent on establishing that the accident arose "out of and in the course of employment." See Workers' Compensation Act § 3 (1956). The Workers' Compensation Amendment Act, however, No. 125, 2 N.Z. Stat. 1008, § 2A(1) (1972), provides that the Act no longer applies to cases of personal injury or death due to accident.

4. See ACA § 113. In December 1981 the New Zealand Government announced that the maximum earnings-related compensation was to be increased from NZ\$288 per week to NZ\$600 per week (NZ\$31,200 per year). See Vennell, *The Accident Compensation System and The Mt. Erebus Claims: The Effects of Inflation on Damages Awards*, 1982 RECENT LAW 295, 297.

5. Vennell, *supra* note 4, at 297.

6. A claimant compensated under the ACA still has a common law right to bring proceedings for punitive damages arising out of the same event. See *Donselaar v. Donselaar*, [1982] 1 N.Z.L.R. 97, 111 (N.Z. Ct. App.), where the court cited with approval the Texas Supreme Court's decision of *Fort Worth Elevators Co. v. Russell*, 123 Tex. 128, 70 S.W.2d 397 (1934). In *Fort Worth Elevators*, punitive damages were allowed in addition to compensation awarded under the Workmen's Compensation insurance legislation. In New Zealand, recovery of punitive damages is excluded in fatal cases by section 3 of the Law Reform Act, No. 31, 17 N.Z. REPR. STAT. 809 (1936), but would be available in a nonfatal personal injury claim.

7. ACA § 5.

8. *Id.*

subject of extensive academic comment and judicial review,⁹ the private international law provisions, which apply when proceedings are brought outside New Zealand, have received little comment¹⁰ and only recently have become the subject of judicial interpretation.¹¹

This Article examines how the private international law provisions apply in aviation product liability. All aircraft which operate in New Zealand are manufactured overseas. Most are manufactured in the United States. Consequently, if the operation of a defective aircraft causes injury or death in New Zealand, the private international law provisions would apply.¹² This Article will focus on the decision of the United States Court of Appeals for the Sixth Circuit in *Bennett v. Enstrom Helicopter Corp.*¹³

Bennett arose out of a fatal helicopter accident in New Zealand and was a classic products liability action against the Michigan corporation that manufactured the allegedly defective product which, the plaintiff asserted, caused the accident.

Under Michigan law, the *lex loci delicti* rule applied in plaintiff's tort claim.¹⁴ On the basis of this rule, both the trial court and the appellate court held that the substantive law of New Zealand applied and that the "exclusive remedy" provisions of the ACA controlled liability. The courts held that since compensation had already been awarded under the ACA, no further claim could be sustained.

This Article submits that both the trial court and the appellate court, in holding that the ACA was the exclusive remedy, misinterpreted the substantive law of New Zealand on recovery for personal injury or death. The ACA left intact the common-law right of recovery

9. Sections 153-69 of the ACA make provision for a review, with a hearing, to the Accident Compensation Commission which is set up under section 6 to administer the legislation. There is a right of appeal to the High Court and the New Zealand Court of Appeal. See Palmer, *Accident Compensation in New Zealand: The First Two Years*, *supra* note 2, at 4-5 (the writer lists the problem areas of interpretation in the first two years of the ACA's operation).

10. For a brief comment see Webb & Auburn, *New Zealand Conflict of Laws—A Bird's Eye View*, 26 INT'L & COMP. L.Q. 971, 983-84 (1977).

11. *Bennett v. Enstrom Helicopter Corp.*, 679 F.2d 630 (6th Cir. 1982).

12. While the doctrine of *forum non conveniens* can be a formidable barrier to recovery in a United States court, discussion relating to this issue is beyond the scope of this Article.

13. 679 F.2d 630 (6th Cir. 1982).

14. *Bennett v. Enstrom Helicopter Corp.*, No. M75-59CA2, slip op. (W.D. Mich. Nov. 12, 1980), (citing *Abendschein v. Farrell*, 382 Mich. 510, 172 N.W.2d 137 (1969); *Wingert v. Wayne Circuit Judge*, 101 Mich. 395, 59 N.W. 662 (1894)). The *lex loci delicti* rule is that the law of the country where the wrong took place is the substantive law to be applied to the case. BLACK'S LAW DICTIONARY 820 (5th ed. 1979).

in the case of wrongful death caused by negligence¹⁵ if there is no coverage under the ACA, or if there is coverage but the right to bring such proceedings in a foreign court is not precluded. *Bennett* falls into this latter category of "concurrent recovery." It is on this basis that the submission is made that the *Bennett* court's decision was premised on a misinterpretation of the substantive law of New Zealand.

This Article will consider the conclusions of both the trial and appellate courts in *Bennett* and will examine the substantive law of New Zealand applicable in a wrongful death case. The discussion focuses on the ACA provisions which state the statutory test that must be satisfied before proceedings may be brought in a foreign court when compensation has already been awarded under the ACA. The common-law rules which survived the enactment of the ACA will also be analyzed. The statutory test is then applied to the facts of *Bennett*. This application outlines the potential liability of a foreign manufacturer for defective products which cause death or personal injury in New Zealand. Also, it illustrates the procedure available to the Accident Compensation Commission in exercising its right of indemnity under private international law provisions of the ACA. Finally, this Article considers the application of foreign law in United States federal courts.

II. *BENNETT v. ENSTROM HELICOPTER CORP.*

The fatal accident which gave rise to the action in *Bennett* occurred in New Zealand during the course of a demonstration flight, due, as the plaintiff argued, to the defective helicopter manufactured in Michigan by the defendant corporation. Under the district court's diversity jurisdiction, the plaintiff, on behalf of the estate of the deceased, sought damages under the Michigan Wrongful Death Statute¹⁶ on counts of negligence, breach of both express and implied warranty of fitness, and breach of implied duty of care owed to a bailee.

The court applied the *Klaxon v. Stentor Electric Manufacturing Co.*¹⁷ principle that in a diversity case the federal court is required to apply the conflict of laws doctrine of the forum state.¹⁸ Relying upon

15. See *infra* text accompanying notes 28-41. See also Vennell, *Residual Liabilities Under the New Zealand Accident Compensation Scheme*, AUSTRALIAN INS. INST. J. 14 (1980) (the writer shows that there are clearly areas of residual liability remaining where recovery is based on negligence).

16. MICH. COMP. LAWS ANN. § 600.2922 (West 1982).

17. 313 U.S. 487 (1941).

18. 679 F.2d at 631.

Michigan authority, the district court¹⁹ maintained that the *lex loci delicti* rule was to be applied in such a tort action²⁰ unless it would frustrate an announced Michigan public policy.²¹ The court concluded that the mere fact of manufacture of the helicopter in Michigan was insufficient reason to apply Michigan law under the public policy exception.²²

Since the *lex loci delicti* rule was to govern the case, the court had to establish the substantive law of New Zealand relevant to the facts before it. The trial court relied on an affidavit from a former Prime Minister of New Zealand, Sir John Marshall, and concluded that the ACA was the plaintiff's "exclusive remedy." In reaching its conclusion that this was a "correct statement of the applicable law of New Zealand," the court relied on the following part of the affidavit: "In these circumstances no proceedings for damages arising directly or indirectly out of the death of Edwin H. Bennett can be brought by any person under any law of New Zealand or any enactment in any court in New Zealand."²³ This conclusion that the ACA was the exclusive remedy was affirmed on appeal by the Court of Appeals for the Sixth Circuit.²⁴

Arguing on appeal that the district court had misconstrued the ACA or "erred in applying New Zealand law,"²⁵ the plaintiff emphasized section 5(1) of the ACA which only excluded an action brought in New Zealand even though compensation already had been received under ACA. The court, while endorsing this argument by recognizing that the New Zealand legislature could not restrict the jurisdiction of other sovereign states, did not, however, accept the plaintiff's argument that since there was no longer a common-law tort action under New Zealand law, the Michigan Wrongful Death Statute should be applied.²⁶

The argument that the Michigan statute should be the basis of the action must be rejected simply because the whole case proceeded on a

19. No. M75-59CA2, slip op. (W.D. Mich. Nov. 12, 1980).

20. *Abenschein v. Farrell*, 382 Mich. 510, 172 N.W.2d 137 (1969), *Wingert v. Wayne Circuit Judge*, 101 Mich. 395, 59 N.W. 662 (1894).

21. *Sweeney v. Sweeney*, 402 Mich. 234, 262 N.W.2d 625 (1978). In *Bennett*, the plaintiff argued that an announced public policy in Michigan was safety in aeronautics. 679 F.2d at 632.

22. No. M75-59CA2, slip op. at 5 (W.D. Mich. Nov. 12, 1980).

23. *Id.* at 2.

24. 679 F.2d at 631.

25. *Id.*

26. *Id.*

misconception that the ACA is an exclusive remedy in a case involving wrongful death, which it is not.

III. THE SUBSTANTIVE LAW OF NEW ZEALAND IN A CASE OF PERSONAL INJURY OR DEATH

The substantive law of New Zealand for the recovery of damages in personal injury or wrongful death cases has two sources: the ACA and the common law tort of negligence.²⁷ Most claims that result from accidents occurring in New Zealand will be covered by the provisions of the ACA to the exclusion of a common law action.²⁸ In the following situations, however, the ACA is not applicable and the common law of negligence governs.

A. When recovery is specifically excluded under the provisions of the ACA

The majority of the claims on behalf of the passengers who lost their lives in the disaster at Mt. Erebus, Antarctica in November 1979 came within this category. The New Zealand passengers on that fatal flight were on domestic carriage as defined by the New Zealand Carriage by Air Act, 1967,²⁹ but coverage under the ACA was excluded by section 150A. Section 105A³⁰ states that the ACA is applicable only to injuries occurring within three hundred nautical miles of New Zealand. The Mt. Erebus accident occurred beyond that limit. Therefore, the ACA did not apply and the absolute liability³¹ of the carrier, Air New Zealand, was limited to the sum of NZ\$42,000,000,³² except in the case of willful misconduct.³³ The basis for recovery was the common-law

27. The term "common law" as used here to refers to the common law as modified by statute.

28. ACA § 5(1).

29. No. 151, 2 N.Z. Stat. 1218 (1967).

30. Where any person has cover under this Act, not being a seaman or airman in the course of his employment as such, embarks in New Zealand on a ship or aircraft or other means of conveyance by sea or air to travel from one place in New Zealand to another place in New Zealand or to return to his place of embarkation without disembarking at any other place, but in either case does not go beyond a limit of 300 nautical miles from any point or points in New Zealand, that person shall, for the purpose of this Act be deemed to have remained in New Zealand.

New Zealand Carriage by Air Act § 105A, No. 151, 2 N.Z. Stat. 1218 (1967), as amended by Accident Compensation Amendment Act § 9, No. 36, 1 N.Z. Stat. 296 (1978).

31. Carriage by Air Act § 22.

32. *Id.* § 28.

33. *Id.* § 31. The Act adopts the same principle of recovery beyond the limit provided for in section 28 as it applies to international carriage as stated in part 1 of the same statute.

tort of negligence under the provisions of the Law Reform Act (1936),³⁴ the Deaths by Accidents Compensation Act (1952),³⁵ and the Carriage by Air Act (1967).

B. When the injuring event occurred before the ACA came into force in 1974 but the actual injury was not manifest until after that date³⁶

C. When the injury occurred outside New Zealand due to a defective product manufactured in New Zealand

The overseas consumer would have a cause of action against a New Zealand manufacturer.³⁷

D. When the injury occurred in New Zealand with coverage under the ACA, but the section 131 test for bringing a claim in a foreign court is satisfied

If there is additional recovery in a foreign court, the Accident Compensation Commission is given discretionary power to deduct the amount paid under the ACA from that recovered in the foreign court.³⁸ An example of a group of claimants that fall into this category is the Air New Zealand crew in the Mt. Erebus DC-10 disaster. The crew, having coverage under the ACA,³⁹ is pursuing a claim against the United States Government for the breach of duty of care by the McMurdo Sound air traffic controllers, who were members of the United States Navy. If this claim is successful, the Accident Compensation Commission could exercise its discretionary power under section 131 and recover the amounts that already have been paid to the dependents of the crew members under the ACA.⁴⁰

1. The ACA

Section 5(1) outlines the statutory scheme as follows:

Subject to the provisions of this section, where any person suffers

34. No. 31, 17 N.Z. REPR. STAT. 809 (1936).

35. No. 35, 3 N.Z. REPR. STAT. 845 (1952).

36. See, e.g., *Collins v. Connolly & Anor*, unreported opinion, A. 181/76 (High Court, Rotorua Feb. 10, 1981).

37. Freedman, *Why Not an Accident Compensation Act? Your Company Should Elect a "No-fault" Modus Operandi*, 1978 INS. L.J. 511, 513.

38. ACA § 131.

39. *Id.* § 105A.

40. See Vennell, *supra* note 4, at 296-97.

personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he had cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any court in New Zealand independently of this Act, whether under any rule of law or any enactment.⁴¹

Section 5(1) clearly abrogates the common-law right to bring proceedings for the recovery of damages in New Zealand if there is ACA coverage. This subsection, however, is qualified by section 5(3)(a) which states: "Nothing in this section shall affect: Any action which lies in accordance with section 131 of this Act."⁴² Under section 131(1) the following test is laid down for determining whether or not a claim may lie outside New Zealand:

In any case where a person suffers personal injury by accident either within or outside New Zealand, or dies as a result of personal injury so suffered, if the person has cover under this Act in respect of the injury, and if under the law of the country in which he suffers the injury, or under the law of any other country (except New Zealand), or pursuant to any international agreement or convention or protocol, or any amendments thereto, a claim for damages or compensation in respect of the injury or death lies on behalf of the person, the Commission may, in its discretion do all or any of the things specified in subsection 3 of this section.⁴³

If a personal injury or wrongful death occurs in New Zealand in an accident to which the ACA applies, and if a claim for damages lies under the law of any country except New Zealand, section 131(3) provides that the Accident Compensation Commission has the following discretionary powers:

1. Deduct the amount payable under the Act, or recover from the person to whom compensation has already been paid, from any amount recovered by the enforcement of a claim under section 131.⁴⁴
2. Require that all reasonable steps to be taken to pursue the claim for damages as a condition precedent to payment of compensation under the Act.⁴⁵
3. The Commission may meet the whole or part of the costs in pur-

41. ACA § 5(1).

42. *Id.* § 5(3)(a).

43. *Id.* § 131.

44. *Id.* § 131(3)(a).

45. *Id.* § 131(3)(b).

suing such a claim.⁴⁶

The drafters of this legislation clearly intended that persons recovering under the ACA pursue claims available from other sources as a condition precedent to statutory compensation. In essence, section 131(3)(a) gives the Commission a right of subrogation along with the discretion under section 131(3)(c) to meet costs in pursuing concurrent claims.

In applying the section 131 test for bringing a claim in a foreign court to the facts of *Bennett*, where the accident occurred in New Zealand with the claimant having coverage under the ACA, the question turns on whether under the law of "any other country (except New Zealand)" a claim for damages will lie.⁴⁷ Since this claim was brought in Michigan where a claim for damages is actionable under the Michigan Wrongful Death Statute,⁴⁸ a claim for damages should lie under Michigan law. Therefore, *Bennett* satisfies the statutory test of the New Zealand ACA for bringing a claim in a foreign court.

Since the substantive law of New Zealand permits a common-law claim in negligence only if the action is brought outside New Zealand, which was the cause in *Bennett*, a negligence claim on the basis of the *lex loci delicti* rule is permitted under section 131.

Since the *lex loci delicti* rule in Michigan prescribes that the substantive law of New Zealand be applied, the common-law claim in negligence that concurrently exists with the ACA must now be considered since it is this remedy that was applicable in *Bennett*.

2. Common Law

Under common law, the general rule in a wrongful death case was expressed in the maxim *actio personalis moritur cum persona*:⁴⁹ a personal action dies with the litigant. This rule was subsequently displaced by the Law Reform Act (1936).⁵⁰ This "survival statute,"

46. *Id.* § 131(3)(c).

47. This section is based on the "double actionability" principle of *Boys v. Chaplin* [1971] A.C. 356. Under this principle, a claim for damages must be recognized in both the country where the claim arose and in the country where the claim is brought.

48. MICH. COMP. LAWS ANN. § 600.2922 (West 1982).

49. The origin of this rule in the English common law has been the subject of much conjecture among legal writers, but it is generally agreed that it was during the time of Lord Ellenborough that its usage originated in its modern form. See Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431 (1916); Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960); Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239, 244 (1929).

50. Section 3(1) of the Law Reform Act of 1936 provides: "Subject to the provisions of this Part of this Act, on the death of any person after the passing of this Act all causes of

modeled on the Law Reform (Miscellaneous Provisions) Act of 1934 (U.K.),⁵¹ permitted the survival of rights of action which had vested in the deceased during his or her lifetime for the benefit of his or her estate.

In addition to the maxim *actio personalis moritur cum persona*, there was also the accompanying principle, first expressed in *Baker v. Bolton*,⁵² that the death of a human being could not be complained of as an injury in a civil court. In *Baker v. Bolton*, a woman had died in a stage coach accident. While her husband received damages for loss of his wife's consortium up to the time of her death, he was unable to recover for any subsequent loss. The Deaths by Accidents Compensation Act (1952)⁵³ created a right of action for dependents of the deceased and specified the types of damages recoverable. This cause of action was designed to compensate the dependents for the loss sustained by the death of the deceased.

The Law Reform Act (1936) was subsequently amended by the Statutes Amendment Act in 1937.⁵⁴ This amendment abolished claims by decedents' estates to recover damages for pain and suffering, for any bodily or mental harm, or for the curtailment of life expectancy. In 1977, however, the Finance Act⁵⁵ repealed the Statutes Amendment Act and revived the right to claim damages for loss of life expectancy.⁵⁶

An estate claim under the Law Reform Act (1936) supplements a dependency claim under the Deaths By Accidents Compensation Act (1952), although damages in an estate claim are taken into account in a

action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of his estate."

51. 24 & 25 Geo. 5, ch. 41 (1934).

52. [1808] L. Camp. 493.

53. Section 4(1) of the Deaths by Accidents Compensation Act provides:

Where the death of a person is caused by any wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as to amount in law to a crime.

The Deaths By Accidents Compensation Act is based on Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93.

54. No. 38, 15 N.Z. REPR. STAT. 133, § 17 (1937).

55. No. 75, 2 N.Z. Stat. 939, § 19 (1977).

56. In the House of Lords case of *Gammell v. Wilson* [1981] 1 All E.R. 578, an award was made for both loss of expectation of life and "lost years" (loss of earnings in the lost years) in a claim under the Law Reform Act (1934 U.K.). See comment by Vennell, *supra* note 4, at 295 (the writer maintains that under the present law in New Zealand, a court would be likely to follow the *Gammell* case and allow both claims under the Law Reform Act (1936 N.Z.)).

dependency claim. In many cases, the dependents will also be the beneficiaries of the estate, in which case both the dependency and estate claims will proceed simultaneously in the same action.

This was the common-law basis of a negligence action in the case of wrongful death at the time the ACA came into force in 1974. The ACA added a series of significant amendments⁵⁷ to the common-law rules, but the ACA did not repeal these rules. The amendments provided that section 3⁵⁸ of the Law Reform Act (1936) and section 4⁵⁹ of the Deaths By Accidents Compensation Act (1952) were subject to section 5 of the ACA. In effect, section 5 of the ACA provided that any action under the Law Reform Act (1936) or the Deaths By Accidents Compensation Act (1952) could be brought only in a court outside New Zealand where the plaintiff had coverage under the ACA. If there was no coverage under the ACA⁶⁰ the action could be brought in a court in New Zealand.

3. Product Liability in New Zealand Based on Negligence

In New Zealand "product liability" is not a new tort in consumer protection as it is in the United States.⁶¹ There is, nevertheless, compensable redress for damage caused by defective products, in both tort (based on negligence) and contract (breach of express or implied warranty of fitness under the Sale of Goods Act (1908)).⁶²

Any consideration of an action in negligence for defective products must begin with the words of Lord Aitkin in the celebrated case of *Donaghue v. Stevenson*⁶³ where he stated:

. . . a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of

57. See ACA Third Schedule.

58. See *supra* note 54.

59. See *supra* note 57.

60. For example, where excluded under § 105A of the ACA.

61. Tobin, *Product Liability: A United States Commonwealth Comparative Survey*, 3 N.Z.U.L. REV. 377 (1969). Tobin concludes that, in New Zealand, while in practice negligence with *res ipsa loquitur* results in "de facto strict liability," there are still objections to the present position that could only be alleviated by adopting strict liability. See also Wincup, *Consumer Protection—Products Liability*, in *THE IMPACT OF AMERICAN LAW ON ENGLISH AND COMMONWEALTH LAW* 107 (J. Elkind ed. 1978).

62. No. 168, 13 N.Z. REPR. STAT. 615 (1908). There is provision for redress in contract by suing on the purchase contract, but since this Article is concerned with an action in tort, this remedy has been excluded.

63. [1932] A.C. 562.

reasonable care in the preparation or putting up of the products will result in any injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.⁶⁴

Under Lord Aitkin's test, the standard of care demanded from a manufacturer essentially amounted to strict liability by the application of the principle of *res ipsa loquitur*. In other words, a manufacturer's negligence is inferred from the injury caused by the defective product. This was the approach of the Privy Council in the case of *Grant v. Australian Knitting Mills*,⁶⁵ where Lord Wright stated: "Negligence is founded as a matter of inference from the existence of the defects taken in connection with all the known circumstances; even if the manufacturers could by apt evidence have rebutted that inference they have not done so."⁶⁶

It should be mentioned that although the application of the principle of *res ipsa loquitur* essentially amounts to strict liability,⁶⁷ there is an important difference between negligence with *res ipsa loquitur* and strict liability. That difference is that negligence still applies a standard of reasonableness.

New Zealand and other Commonwealth courts have applied the principles laid down in *Donaghue v. Stevenson* and *Grant v. Australian Knitting Mills* to cases involving defective food and drink,⁶⁸ cosmetics,⁶⁹ underwear,⁷⁰ motor cars,⁷¹ elevators,⁷² and sheep dip.⁷³

Thus, applying Lord Aitkin's rule in order to sustain an action for damages in a product liability case involving a defective aircraft, the plaintiff would have to establish that there was a duty of care owed. It is then likely that the court would apply the principle of *res ipsa loquitur* and negligence would be inferred from the facts.

These principles are the basis upon which recovery should be determined under the facts of *Bennett*. The question of the appropriate

64. *Id.* at 599. This was sixteen years after similar words had been uttered by Justice Cardozo in *MacPherson v. Buick Motors Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916).

65. [1936] A.C. 85.

66. *Id.* at 101.

67. This concept is stated in section 402 of the RESTATEMENT (SECOND) OF TORTS (1966). For an account of the law relating to products liability in the United States see L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* (1979).

68. *Read v. Croydon Corp.*, [1938] 4 All E.R. 631; *Barnes v. Irwell Valley*, [1939] 1 K.B. 21.

69. *Watson v. Buckley*, [1940] All E.R. 147.

70. *Grant v. Australian Knitting Mills*, [1936] A.C. 85.

71. *Herschthal v. Stewart & Arden*, [1940] 1 K.B. 155.

72. *Haseldine v. Daw*, [1941] 2 K.B. 343.

73. *Grant v. Cooper, McDougall & Robertson Ltd.*, [1940] N.Z.L.R. 947 (Sup. Ct. & Ct. App.).

quantum of damages, therefore, would have to be determined. Although beyond the scope of this Article, a substantial body of law exists on such issues as awarding of interest⁷⁴ and the question of inflation⁷⁵ in the awarding of lump sums in personal injury and wrongful death cases.

The focus must now turn from the applicable New Zealand law to a consideration of the application of foreign law⁷⁶ by United States federal courts. Certain statutory and procedural guidelines, along with a series of judicial practices, assist the courts in applying foreign law and now will be briefly considered.

IV. THE APPLICATION OF FOREIGN LAW IN FEDERAL COURTS

Traditionally, under the Anglo-American common law doctrine, an issue of foreign law was a question of fact and not of law.⁷⁷ Therefore, when foreign law was misapplied it was an error of fact and not of

74. The judge has a discretionary power to award interest on damages awards under section 87 of the Judicature Act (1908) *as amended by* the Judicature Amendment Act (1952), No. 89, 6 N.Z. REPR. STAT. 699 (1908). An award of interest was made under section 87 in *Tauranga Harbour Board v. Clark*, [1971] N.Z.L.R. 197.

75. The method of discounting, whereby the predicted rate of inflation is deducted from the predicted rate of interest, has been used by the High Court of Australia in assessing lump sum personal injury awards. Although a New Zealand court is not bound to follow these decisions, it is likely that it would do so. See *Barrell Ins. Party Ltd. v. Pennant Hills Restaurants Party Ltd.*, 55 Austl. L.R. 258 (1981), and *Todorovic & Another v. Waller*, 56 Austl. L.R. 59 (1981).

76. The term is used to refer to foreign country or alien law as distinct from sister state law which, like treaty law, is domestic law. But see *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973). The court maintained that the French legal meaning was to govern the interpretation of a provision of the Warsaw Convention on Private International Air Law. Although this was domestic law, the court held that it was determining a question of foreign law and in this way Federal Rule of Civil Procedure 44.1 could be invoked. See *infra* note 85. Here, the court's use of the comparative method to interpret the French legal meaning of the treaty provisions as a ground for invoking rule 44.1 is inconsistent with the words of that rule which refer only to "foreign country" law. Use of the comparative method does not alter the basis of treaty law which is domestic law. See *In re Air Crash in Bali, Indonesia*, 17 Av. L. REP. (CCH) ¶ 17,416 (9th Cir. 1982) (the court noted that treaty provisions have the same effect as domestic law).

77. See, e.g., *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 38 (1801). In this early case the Supreme Court held that foreign law had to be proved as a fact and could not be judicially noticed. *Id.* This same position was maintained over one hundred years later in *Cuba R.R. v. Crosby*, 222 U.S. 473 (1912). See also *Bridgman, Proof of Foreign Law and Facts*, 45 J. AIR L. & COM. 845 (1980); Miller, *Federal Rule 44.1 and the 'Fact' Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613 (1967); Peritz, *Determination of Foreign Law Under Rule 44.1*, 10 TEX. INT'L L.J. 67 (1975); Sass, *Foreign Law in Civil Litigation: A Comparative Survey*, 16 AM. J. COMP. L. 332 (1968).

law and, as such, could not be reviewed on appeal.⁷⁸ While many courts remedied this situation by applying a judicial "presumption of law,"⁷⁹ this rule has now been changed by statute.

By virtue of section 4.03 of the Uniform Interstate and International Procedure Act (1962),⁸⁰ a court's determination of foreign law is to be one of law and not fact and is subject to review on appeal.

Rule 44.1 of the Federal Rules of Civil Procedure⁸¹ is modeled after the Uniform Act and states, *inter alia*, that foreign law will be a question of law and not of fact. As an aid to the determination, rule 44.1 prescribes minimum notice requirements of reliance on foreign law,⁸² permits the court to carry out independent research,⁸³ and suspends the application of the Federal Rules of Evidence to Evidence of the foreign law. While these provisions have not been uniformly interpreted, certain guidelines can be discerned from the decisions to date.

A. The Notice Requirement

With the abandonment of the fact doctrine foreign law no longer must be pleaded like other facts.⁸⁴ To prevent surprise, reasonable notice of reliance on foreign law is required to be given by the party relying on it.⁸⁵ What constitutes "reasonable notice" is determined by the

78. It could arguably give rise to an unjust enrichment claim under RESTATEMENT OF RESTITUTION § 46(c) (1937); see E. SCOLES & P. HAY, CONFLICT OF LAWS 404 n.6 (1982).

79. E. SCOLES & HAY, *supra* note 78, at 404 n.9, 405 n.13.

80. 3 U.L.A. 459 (1980). See E. SCOLES & P. HAY, *supra* note 78, at 408 n.13.

81. 28 U.S.C. § 44.1 (1976). Rule 44.1 came into force in 1966 and was amended in 1972. The amended version which came into force in 1975 provides:

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

82. See text accompanying notes 88-99; Fed. R. Civ. P. 44.1 advisory committee note.

83. See Pollack, *Proof of Foreign Law*, 20 AM. J. COMP. L. 470 (1978); see *infra* text accompanying notes 105-06; Fed. R. Civ. P. 44.1 advisory committee note.

84. But see the decisions of the following two district courts sitting in Admiralty, *Kearney v. Savannah Foods & Indus. Inc.*, 350 F. Supp. 85 (S.D. Ga. 1970) and *Michael v. S.S. Thanasis*, 311 F. Supp. 170 (N.D. Cal. 1970). There is no reference in either case to rule 44.1, and both courts maintained that foreign law is still a question of fact and like other facts must be pleaded and proved. But see *Peritz*, *supra* note 77, at 70-71. The writer proffers as a possible explanation which the court could have relied on in the *Michael* case, but did not: since this was a proceeding *in rem* to which the Supplementary Rules for Certain Admiralty and Maritime Claims applied, the standard of sufficiency under those rules for foreign law could only be satisfied if the law was pleaded as a fact. *Id.*

85. The Advisory Committee on Rules stated the following in regard to the first sentence of Rule 44.1: "To avoid unfair surprise, the first sentence of the new rule requires that

specificity of the contents and when it is given.

It has been held that such notice should be given in the district court proceedings.⁸⁶ This, however, has been referred to as a rule of practice only.⁸⁷ When notice is given in a brief, case law on reasonableness of notice is unclear. While one district court held that it was not sufficient notice to raise an issue of foreign law in the party's brief,⁸⁸ the Fifth Circuit in a subsequent case held that mention in the brief was sufficient notice.⁸⁹

Although the notice requirement is not a formal pleading requirement,⁹⁰ it would be advisable to include notice of the alleged application of foreign law in the complaint or the answer.

The specificity of the foreign law required of the written notice is also a subject of uncertainty. While some courts have required that the substance and alleged effect of foreign law be specified,⁹¹ one court has

a party who intends to raise an issue of foreign law shall give notice thereof. . . it shall be written and reasonable. It may, but need not be, incorporated in the pleadings."

86. *Ruff v. St. Paul Mercury Ins. Co.*, 393 F.2d 500, 502 (2d Cir. 1968). The court held that the reasonable notice requirement was not satisfied when an issue of foreign law was not raised until the appellate level. *Id.* But see *Peritz*, *supra* note 77, at 72. The writer maintains that neither the rule's text nor the Advisory Committee's notes limit the notice to the pre-appellate stages of litigation. *Id.* The notice of the intention to raise an issue of foreign law is based on the same policy of notice vis-à-vis domestic law. Therefore, if rejection of an issue raised is a question of the court's discretion, it should not be treated differently. See also *Bridgman*, *supra* note 77, at 856 n.46. Subsequent cases are cited and demonstrate liberal pre-trial treatment of foreign law problems. See, e.g., *First Nat'l Bank v. British Petroleum Co.*, 324 F. Supp. 1348 (S.D.N.Y. 1971); *Kolcinimport "Rotterdam" N.V. v. Foreston Coal Export Corp.*, 283 F. Supp. 184 (S.D.N.Y. 1968) (the parties were invited to use the remaining time before judgment to plead Dutch law).

87. *Green v. Brown*, 398 F.2d 1006 (2d Cir. 1968).

88. *Modavelli v. Midland Mut. Ins. Co.*, 10 Ohio App. 2d 115, 226 N.E.2d 137 (1967). The plaintiff did not plead Ontario law in the petition nor present evidence of such law at the trial but cited a statute and court decision in the brief and in oral argument. *Id.* *Contra*, *Gadd v. Pearson*, 351 F. Supp. 895 (M.D. Fla. 1972). The court gave a time period within which the parties were to file memoranda and affidavits concerning an issue of foreign (Bahamian) law. *Id.*

89. *First Nat'l City Bank v. Compania de Aguaceros, S.A.*, 398 F.2d 779, 781 (5th Cir. 1968).

90. FED. R. CIV. P. 8, 9. See *Bridgman*, *supra* note 77, at 855 n.41.

91. See, e.g., *Bryne v. Cooper*, 11 Wash. App. 549, 523 P.2d 1216 (1974). The court held that the notice of foreign law should be in the pleadings and should sufficiently reflect the foreign law relied on so that the opponent can grasp the significance of the pleader's claim. *Id.*; see generally *Bridgman*, *supra* note 77, at 862. *Bridgman* states that there is a minimum requirement for the party relying on foreign law. It must include citations to the relevant statutory or decisional law. See *Telesphore Couture v. Watkins*, 162 F. Supp. 727 (E.D.N.Y. 1958); *Taca Int'l Airlines v. Rolls Royce of Eng. Ltd.*, 47 Misc. 2d 771, 263 N.Y.S.2d 269 (Sup. Ct. 1965); see also *Sass*, *supra* note 77, at 100. *Sass* argues that the specificity required of the written notice be determined by its function which is to prevent surprise to the court and the adversary party. In this way, the amount of information re-

held that the notice is not required to identify the substance of the foreign law.⁹²

Despite this lack of judicial consensus as to the requirement, it would appear that if the basis of the alleged cause of action under foreign law is not identified in the pleadings⁹³ or in an additional notice, the action would be subject to a motion to dismiss for failing to state a claim upon which relief could be granted under rule 12(b)(6) of the Federal Rules of Civil Procedure.⁹⁴ In addition, a motion for a more definite statement under rule 12(e) may be made.⁹⁵

B. Sources and Materials the Court May Use

Unconstrained by the Federal Rules of Evidence,⁹⁶ courts have accepted expert testimony and affidavits of experts,⁹⁷ foreign texts and treatises,⁹⁸ and even unauthenticated copies of foreign laws⁹⁹ as evidence.

The role of court and counsel is also somewhat uncertain. Under Federal Rule of Civil Procedure 44.1 the court may conduct its own

quired in the notice should depend on its timing. Thus, the later the notice is given, the more detailed the information should be. The notice should always identify the relevant foreign law by adequately citing sources, and, if necessary, provide background information. *Id.*

92. *Grice v. A/S J. Ludwig Mowinckels*, 477 F. Supp. 365 (S.D. Ala. 1979). The court recognized that determining the law of many foreign countries involved extensive research that could not be contained within the law firm library and that research may extend to university libraries, embassies, the offices of metropolitan practitioners, and often to the members of the Bar of the foreign nation itself. The court, therefore, considered that it would be unfair to hold the admiralty lawyer to a requirement of setting out the applicable substantive law in the complaint, and added that this would be particularly unfair in a practice where lawyers are often hired one day before the statute of limitations runs out. *Id.*

93. *See supra* note 85.

94. *See* 477 F. Supp. 365. The court held that to survive a rule 12(b)(6) motion, the requirement under rule 44.1 falls short of identifying the substance of the applicable foreign law. *Id.*; *see also* C. WRIGHT, *LAW OF FEDERAL COURTS*, 314 (1976). Wright states that the liberal rules as to the sufficiency of a complaint make it rare for a motion on this ground to be granted.

95. FED. R. CIV. P. 12(e); *see* Bridgman, *supra* note 77, at 863.

96. 28 U.S.C. Rules App. (1976 & Supp. V 1981) (enacted by Congress to govern the proceedings in federal courts, effective Jan. 2, 1975).

97. *See e.g.* *Noto v. Cia Secula di Armanento*, 310 F. Supp. 639 (S.D.N.Y. 1970); *Instituto per lo Sviluppo Economico v. Sperti Prod., Inc.*, 323 F. Supp. 630 (S.D.N.Y. 1971).

98. *See, e.g.*, *Ramsay v. Boeing Co.*, 432 F.2d 592 (5th Cir. 1970); *Manos v. Trans World Airlines, Inc.*, 324 F. Supp. 470 (N.D. Ill. 1971).

99. *Ramirez v. Autobus Flecha Roja*, 486 F.2d 493 (5th Cir. 1973) (in the district court proceedings, an unauthenticated copy of the Mexican Code was consulted); *see* Sass, *supra* note 77, at 109.

research. While there are instances of courts actually doing this,¹⁰⁰ the courts are generally reluctant to research foreign law.¹⁰¹ This is usually considered to be the task of counsel who is required to argue and brief a case involving foreign law in the same manner as domestic law.¹⁰² In a series of appellate cases the federal courts have interpreted provisions of foreign codes and statutes not previously judicially interpreted. These cases indicate that in the interpretation and application of issues of foreign law the courts have relied on some identifiable judicial presumptions.

In *First National City Bank v. Compania de Aguaceros, S.A.*,¹⁰³ the Fifth Circuit Court of Appeals held that the court has a duty to interpret foreign law provisions even if they are ambiguous. The court was guided in reaching its conclusion by decisions of the United States federal and state courts.¹⁰⁴ In *Bamberger v. Clark*,¹⁰⁵ the court disregarded the view of an expert.¹⁰⁶ Guided by the language and apparent purpose of the relevant provision of the German Civil Code the court interpreted the foreign law provision, in the words of the court, "fairly in accordance with the intention of the code."¹⁰⁷ When confronted with the conflicting testimony of two experts, the Fifth Circuit Court of Appeals in *Ramsay v. Boeing Co.*¹⁰⁸ gave its own interpretation of a provision of the Belgian Civil Code. The Belgian statute was another provision that had not previously been litigated.

100. See, e.g., Sass, *supra* note 77, at 109 n.59 (citing three district court decisions where the court's research supplemented the parties' presentation of foreign law).

101. See, e.g., Pollack, *supra* note 83, at 471. Pollack recognized that rule 44.1 expressly authorized the court to do independent research into foreign law. The writer, a federal court judge, concluded that "researching foreign law is not an appropriate way for federal judges to spend their time." *Id.* He also pointed out that when domestic law is applied, no matter how uninformed and unhelpful the lawyers, the judge still has an obligation to apply the governing law. On the other hand, if foreign law is not proved, it commonly results in the application of local law. *Id.*; see also Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 CORNELL L. REV. 1, 4 n.9 (1973).

102. *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1275 (referring to the statement to that effect in Pollack, *supra* note 83, at 475).

103. 398 F.2d 779 (5th Cir. 1968).

104. The court's findings were consistent with the expert's testimony.

105. 390 F.2d 485 (D.C. Cir. 1968).

106. *Id.* at 488. The expert maintained that the interpretation of the provision of the code asserted by the plaintiff, could not be upheld on the grounds that no German court had applied such an interpretation. The appellate court rejected this, and maintained that: "even in precedent-oriented Anglo-American law, the lack of a precedent doing something is hardly a precedent that it may not lawfully be done."

107. *Id.* at 489.

108. 432 F.2d 592 (5th Cir. 1970).

In *Manos v. Trans World Airlines*,¹⁰⁹ the issue of foreign law before the court was a manufacturer's liability to third parties for manufacturing defects under the tort provisions of the Italian Civil Code. Assisted by two expert witnesses and the only treatise on the subject, the court recognized that tort liability under the code required the concurrence of causation, negligence, and damage. The burden of proof was placed on the plaintiff. The approach of the court was to adopt the test of causation in a United States federal court decision¹¹⁰ because one of the experts had identified the test as being analogous to that in Italian law.

In *Curtis v. Beatrice Foods Co.*,¹¹¹ however, the court recognized its power to reject the uncontradicted conclusions of an expert witness and conducted its own examination of the authorities in a claim under the Colombian Labor Code. The court relied on Colombian decisions and did not rely on an extension of United States cases by analogy as earlier courts had done.

These decisions suggest that the role of the expert witness, while still important, is diminishing as more courts give recognition to the mandate in rule 44.1 that foreign law be determined as law and not as fact. Courts are now freely engaging in statutory interpretation rather than relying on the interpretation of the expert. Clearly, a judicial practice has developed. Courts identify analogous domestic principles and then apply them to foreign law issues.

In light of the foregoing it appears that the *Bennett* court, by failing to interpret the statutory provisions of the ACA and instead unquestionably relying on the testimony of an expert, rendered a judgment that was more in line with the "fact" than the "law" doctrine of foreign law determination. The Sixth Circuit failed even to mention the private international law provisions embodied in section 131 of the ACA. Had it done so, it would have realized the inaccuracies in the expert's statement on which the final judgment of the court was premised.

V. CONCLUSION

This Article has attempted to illustrate that the ACA is not an exclusive remedy in a wrongful death action. The ACA left areas of "residual liability" and for the reasons discussed, *Bennett v. Enstrom*

109. 324 F. Supp. 470 (N.D. Ill. 1971).

110. *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9th Cir. 1961).

111. 481 F. Supp. 1275 (S.D.N.Y. 1980).

Helicopter Corp. is an example of one category of such liability. The ACA left the common-law tort of negligence intact if there is no coverage under the ACA, or if there is coverage but the right to bring proceedings in a foreign court is not precluded. It is submitted that this is the appropriate "substantive law" of New Zealand, applicable as foreign law in *Bennett* and, therefore, should have been applied under the *lex loci delicti* rule.

